



HOUSE MAJORITY OFFICE

Representative Adam Hasner, Majority Leader

Contingency Fee Agreements Between The Department Of Legal Affairs And Private Attorneys House Bill 215 by Representative Eisnaugle

- **We are promoting accountability, transparency and good stewardship of public dollars anytime the Attorney General hires outside legal counsel.**
- **Taxpayer dollars should be maximized by providing a reasonable limit of \$50 million on attorney fees when the Attorney General hires private attorneys on a contingency fee basis.**
- **Floridians deserve confidence that any contracts with private attorneys are in the public's best interest and that public dollars will be used only for the public good.**

Florida's Attorney General has the power to hire private attorneys to sue on behalf of Floridians. However, unlike other contracts between the state and private industry, these contingency fee agreements are not awarded through an open, competitive process. Moreover, the ultimate attorney compensation provided for in the contingency fee agreement is not subject to the Legislative appropriations process. Instead, the attorney compensation is subtracted from damages awarded in judgments entered, or settlement agreements made, on behalf of the state.

In 1994, Florida's Medicaid Third Party Recovery Act was amended to authorize Florida to sue the tobacco industry to recover expenses incurred by the Medicaid Program for treating Floridians with illnesses caused by cigarette smoking. Private attorneys were secured to represent the State in these matters. In or around 1997, private attorneys negotiated a \$13 billion settlement with tobacco companies on behalf of Florida, while \$3.4 billion was provided to the private attorneys for their representation.¹ \$3.4 billion is more than half of the deficit Florida faces for next fiscal year.

In other states, Attorney Generals have hired friends or associates to represent the state at the expense of other more qualified or more reasonably priced counsel.² Just last week, the Wall Street Journal published the below editorial about a contingency fee agreement executed on behalf of the State of Pennsylvania in a lawsuit against Janssen Pharmaceuticals, a subsidiary of Johnson & Johnson.

Florida's Attorney General is committed to making the process of entering into contingency fee agreements with private attorneys more transparent and fair for Floridians. Passage of HB 215 is vital to ensuring monetary awards made to Florida on behalf of its citizens are for the benefit of Florida's taxpayers above and beyond all others.

¹ *Lawyers in Early Tobacco Suits to Get \$8 Billion*, The New York Times, December 12, 1998.

² Robert Levy, *The Great Tobacco Robbery: Lawyers Grab Billions*, Legal Times, February 1, 1999, p.27; *The State Lawsuit Racket: A case study in the politician-trial lawyer partnership*, The Wall Street Journal, April 8, 2009.



REVIEW & OUTLOOK

The State Lawsuit Racket

A case study in the politician-trial lawyer partnership.

April 8, 2009

State Attorneys General regularly hire private plaintiffs lawyers on a contingency-fee basis to prosecute cases. The trial bar returns the favor with campaign donations to state office holders. And despite the inherent conflicts of interest and questionable ethics of the practice, corporate defendants have rarely challenged such arrangements. Which is why a motion pending before the Pennsylvania Supreme Court is so remarkable -- and deserves more public attention.

Janssen Pharmaceuticals, a subsidiary of Johnson & Johnson, is a defendant in a lawsuit filed by the state of Pennsylvania over Janssen's antipsychotic drug Risperdal. The state alleges that Janssen has improperly marketed the drug for off-label uses not approved by the Food and Drug Administration. Janssen denies the accusation, but the merits of the case -- which hasn't gone to trial yet -- are not what's at issue in the motion before the court.

Rather, what's at issue is the fact that the civil action against Janssen is being prosecuted on behalf of the state by Bailey, Perrin & Bailey, a Houston law firm. And it turns out that Pennsylvania Governor Ed Rendell's Office of General Counsel was negotiating this potentially lucrative no-bid contingency fee contract with Bailey Perrin at the same time that the firm's founding partner, F. Kenneth Bailey, was making repeated campaign contributions totaling more than \$90,000 to the Democratic Governor's 2006 re-election bid.

Janssen's motion seeks to invalidate the contingency-fee arrangement and lays out a detailed timeline of Mr. Bailey's political contributions and the subsequent actions of the Governor's office. Here it is in part:

- On February 23, 2006, Mr. Bailey contributed airplane travel valued at \$9,200 to Governor Rendell's re-election campaign.
- On March 3, 2006, Mr. Bailey contributed \$50,000 to the Rendell campaign.
- On May 12, 2006, Mr. Rendell's office submitted a "request of delegation" to the state Attorney General, a Republican, that would allow the Governor's office to handle the case against Janssen.
- On May 24, 2006, the request was granted.
- On June 30, 2006, Mr. Bailey contributed \$25,000 to the Democratic Governors Association (which gave Mr. Rendell more than \$1 million for his campaign in 2006).
- On August 14, 2006, Mr. Bailey signed a no-bid contingency-fee contract with the state.

- On September 15, 2006, Mr. Bailey contributed airplane travel valued at \$6,900 to Mr. Rendell's campaign.
- On October 23, 2006, the Governor's Office of General Counsel mailed the contingency fee contract to Mr. Bailey.
- On October 30, Mr. Bailey contributed another \$25,000 to Mr. Rendell's campaign.
- On February 26, 2007, Bailey Perrin filed the initial complaint against Janssen on behalf of the state.

Asked about the timing of Mr. Bailey's political donations, Rendell spokesman Chuck Ardo says Bailey Perrin was selected because of "their experience in these kinds of legal matters." Mr. Ardo says the Governor was aware of the campaign contributions but "had nothing to do with the selection." Asked why the Governor thought the case should be handled by his office rather than by the state AG, Mr. Ardo says, "the suit involves agencies directly under the Governor's control, and the General Counsel's Office believed it could eliminate a lot of unnecessary work by dealing with those agencies directly." Readers can decide if they buy that one.

Under terms of the contingency-fee contract, Bailey Perrin receives up to 15% of any settlement or judgment. Even better for the lawyers, the state is barred from settling for nonmonetary relief "unless the settlement also provides reasonably for the compensation of [Bailey Perrin] by [Janssen] for the services provided by the law firm under this contract."

In court papers, the drug firm argues that the contingency fee contract is invalid because it wasn't approved by the legislature, as the state constitution requires, and because it "violates Janssen's rights to due process under the United States and Pennsylvania Constitutions, which guarantee that attorneys representing the Commonwealth, acting in its capacity as sovereign, not have direct financial interest in the outcome."

The state Supreme Court is expected to decide soon on Janssen's motion, but whatever the outcome, the episode is another example of why more states should reform the process for retaining outside counsel. It's true that private firms are sometimes needed to help states that lack the resources or expertise to bring certain lawsuits. But it's also true that these outside firms could be paid on an hourly basis. And if contingency-fee contracts are used, open bidding would add transparency and ensure that taxpayers are getting the best deal. Mr. Rendell's office insists that "we have nothing to hide in this matter," but details of the contingency-fee arrangement were obtained by Janssen through a freedom of information request.

State prosecutors are supposed to be motivated by a sense of public responsibility for the interests of justice. Law firms have other motivations, and no-bid contingency-fee deals encourage lawyers with a financial stake in a case to try meritless claims or ask for exorbitant awards. That serves neither taxpayers nor justice, though in this case it sure did help Mr. Rendell's re-election campaign.

<http://online.wsj.com/article/SB123914567420098841.html>